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No. 07-360

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

MARY LOU SMITH,

Petitioner,

v.

HONORABLE ANDREW N. FRYE, JR.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether under the First Amendment, *Elrod v. Burns*, 427 U.S. 347 (1976) and its progeny extend to a claim by an at-will state employee, who was dismissed while her son was running for public office, and who alleges that her dismissal was politically motivated even though she did not engage in any protected conduct or otherwise make her political beliefs or her political affiliation known, and the political beliefs and political affiliation of her supervisor, who was detached from the subject political process, were also unknown?

2. Whether in February 2004, the First Amendment associational rights of public employees were clearly established so that a state official should reasonably know that he could not dismiss an at-will employee at a time when her son was running for public office even though the political beliefs and affiliations of the public employee were unknown and there were no facts alleged to support the public employee's belief that the state official's conduct was politically motivated?

3. Whether F.R.C.P. Rule 12(b)(6) requires a federal court to allow a claim to go forward when the plaintiff makes a conclusory allegation that her dismissal was politically motivated but fails to support this theory with any facts, and when assuming the plaintiff has alleged a violation of her First Amendment associational rights, it is clear the defendant is entitled to qualified immunity?

PARTIES TO THE PROCEEDINGS

The Petitioner in this case is Mary Lou Smith. Greg Smith was a party below, but he is not seeking a writ of certiorari. The Respondent is Judge Andrew N. Frye, Jr. who serves as a circuit judge in the Circuit Court of Mineral County, West Virginia.

RULE 29.6 STATEMENT

In accordance with United States Supreme Court Rule 29.6, Respondent states that he has no parent companies or non-wholly owned subsidiaries.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Petitioner Mary Lou Smith was formerly employed as clerk of the Magistrate Court of Mineral County, West Virginia, an at-will position in the State's judicial system. She was dismissed by her supervisor, the Honorable Andrew N. Frye, Jr. Nothing in the complaint alleges that, at the time of her dismissal, the political beliefs and affiliations of either or both parties were known. Petitioner's termination occurred while her son was running in the Republican Primary for the office of Clerk of the Circuit Court of Mineral County. Petitioner filed suit in the federal District Court for the Northern District of West Virginia alleging that her termination was politically motivated. In her complaint, Petitioner alleged that Judge Frye, her supervisor, fired her because he believed she supported her son instead of the incumbent circuit clerk, but she offered no factual support for this theory.

The Fourth Circuit decision below discussed the types of fact patterns that are commonly present in political firing cases. And while the Court did not conclude that political firings are strictly limited to these fact patterns, it did find that in all previously reported cases the facts showed at a minimum some rational connection between the political beliefs of one or both parties and the adverse employment action. In the court's opinion, this type of logical inference could not be made in this instance, as the case was almost entirely based on the Petitioner's subjective interpretation of events. Contrary to the Petitioner's assertions, the Fourth Circuit's decision in no way narrows the scope of *Elrod-Branti*, and other applicable precedent regarding the First Amendment associational rights of public employees. In reality, the Fourth Circuit simply

refused to extend *Elrod-Branti* to a case that would require a federal court to invade a state's employment practices on mere speculation.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Smith v. Frye*, 488 F.3d 263 (4th Cir. 2007). The Fourth Circuit's denial of the petition for rehearing and rehearing *en banc* is unreported. The unpublished opinion of the District Court is reported at *Smith v. Frye*, Slip Copy, 2006 WL 4757805 (N.D.W.Va. June 14, 2006).

JURISDICTION

The Court of Appeals denied the petition for rehearing and rehearing *en banc* on June 15, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

> peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

The federal statute under which the Petitioner sought remedy is 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively

to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Pertinent Facts

Mary Lou Smith was formerly employed as Magistrate Clerk of Mineral County, West Virginia. As magistrate clerk, Ms. Smith served at the will and pleasure of the Chief Judge of the Circuit Court of Mineral County. Ms. Smith was dismissed from her position as magistrate clerk by Judge Andrew N. Frye, Jr. Her dismissal occurred shortly after her son filed to run in the primary election for the office of Circuit Clerk of Mineral County. Ms. Smith did not express or otherwise make known her political beliefs or her political affiliation.

Judge Frye approached his judicial colleague, Judge Phillip B. Jordan, Jr. to discuss his concerns that a potential conflict had arisen in the local court system. He expressed to Judge Jordan that the best alternative was to dismiss Ms. Smith. Judge Frye did not discuss or even mention the incumbent circuit clerk. A few days later when he dismissed her, Judge Frye offered Ms. Smith no explanation for her termination.

Following her dismissal, Ms. Smith filed for a personnel hearing under the administrative appeal procedures of the West Virginia judicial system. This hearing was conducted by a senior status judge, the Honorable Robert Chafin. Ms. Smith called eight witnesses during the hearing, including Judge Frye's fellow circuit judge, Phillip B. Jordan, Jr. and prosecuting attorney Lynn Nelson. However, the hearing produced no evidence that

Judge Frye's decision to terminate Ms. Smith was politically motivated. Judge Chafin concluded that Ms. Smith was fired because her son became a candidate for the office of circuit clerk, but this did not violate any state or federal law. This decision was ultimately upheld by the West Virginia Supreme Court of Appeals under its judicial personnel administrative review procedures by an order entered on September 16, 2004, Case No. 04115, and a motion for reconsideration denied on September 30, 2004.

B. Proceedings Before the District Court

Ms. Smith filed suit against Judge Frye in the United States District Court of the Northern District of West Virginia pursuant to 42 U.S.C. § 1983. She claimed that her dismissal violated her rights as guaranteed by the First and Fourteenth Amendments of the United States Constitution.[1] She alleged that she was fired because her son became a candidate in the Republican Primary for the office of circuit clerk. She surmised that Judge Frye believed she supported her son and wanted her to support the incumbent clerk, though this theory was not supported by any factual allegations in the complaint.

Judge Frye moved to dismiss Ms. Smith's claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, asserting that Ms. Smith had failed to state a valid claim that her speech and associational rights were violated, and in the alternative that he was entitled to

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[1] Ms. Smith also alleged her rights under Article III, §§ 1, 7 and 16 of the West Virginia Constitution, and under public policy of the State of West Virginia were violated. Upon dismissal of the Petitioner's federal claims, these state law claims were dismissed by the district court without prejudice.

qualified immunity. The district court granted Judge Frye's motion to dismiss. The district court rejected Ms. Smith's "pre-emptive retaliation theory," finding that Ms. Smith had not engaged in any protected speech or conduct, and instead had merely plead that she was the family member of someone running for political office. *Smith v. Frye*, 2006 WL 4757805, Slip Op. at 6-8 (N.D.W.Va. June 14, 2006).

C. Proceedings Before the Fourth Circuit Court of Appeals

Ms. Smith appealed to the Fourth Circuit, claiming the district court erred by failing to consider her freedom of association claim, and basing its decision on her freedom of speech claim. The Fourth Circuit, by a panel majority[2] affirmed the ruling of the District Court.[3] In the Fourth Circuit's view, Ms. Smith had simply not plead facts sufficient to state a claim that her dismissal violated her right to freedom of association.

In reaching its decision, the Court of Appeals reviewed the fact patterns that are commonly found in political firing cases, finding that in previously reported cases there was always some rational connection between the political beliefs, the political affiliations, or both, of one or both

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[2] Judge Motz filed an opinion concurring in part and concurring in the judgment. She opined that Ms. Smith stated a valid claim, but Judge Frye was entitled to qualified immunity.

[3] It would appear that the Petitioner now concedes that there is no valid claim regarding her right to freedom of speech, as she engaged in no expressive conduct or speech. Consequently, only the Fourth Circuit's discussion regarding her association claim is addressed in this response.

parties, and the adverse employment action. Distinct from these cases, Ms. Smith could not make any type of factual connection between her dismissal and Judge Frye's political beliefs. Nor was there any connection between her own political beliefs or affiliation and her dismissal. She had merely plead her theory of why she believed she was fired and nothing more. The Fourth Circuit concluded that *Elrod*, *Branti* and their progeny did not support a claim that required federal courts to make an "inferential leap" rather than a rational connection. "Given the decision-maker's detachment from the political process at play, any conclusion that Judge Frye's decision was intended to punish Ms. Smith for expressive conduct or political affiliation or to compel her conduct or affiliation requires an inferential leap which we are unwilling to make." *Smith v. Frye*, 488 F.3d 263, 271 (4th Cir. 2007).

The Petitioner misconstrues the Fourth Circuit's decision, claiming that the court has now authorized an employer to make a politically based firing before an election, even though the employer could not do the same thing after the election. The Fourth Circuit, however, properly concluded that Ms. Smith had failed to allege any facts that supported her theory of why she was fired – no facts from which to make a rational connection between a political motivation and her dismissal. Despite the Petitioner's contentions, this case cannot be fairly read to suggest that even though Ms. Smith failed to engage in any protected conduct, if there was evidence Judge Frye supported and expected others to support the incumbent clerk her case would still have been dismissed. To the contrary, this is the type of evidence the Fourth Circuit was looking for, but was so glaringly absent from this case.

REASONS THE PETITION MUST BE DENIED

The Fourth Circuit concluded that this case presented a claim to which *Elrod* and *Branti* have never been extended. Unlike previously reported cases, it was not possible to make a rational connection between the political beliefs or the political affiliations of the parties and the adverse employment action. In reality, and as correctly concluded by the Fourth Circuit, the Petitioner had merely plead her perception of why she was dismissed and nothing more.

Therefore, the Fourth Circuit's decision cannot be fairly characterized as restrictive or a departure from precedent. While the court reviewed the fact patterns commonly found in political firing cases, it gave no indication that it was narrowing or limiting First Amendment associational claims to political firings that occur after an election. The Fourth Circuit correctly interpreted the scope of *Elrod*, and simply drew the line at the apposite place under the allegations in this case to prevent federal courts from unnecessarily invading state employment practices based upon nothing more than speculation.

A. Review by this Court Is Not Necessary When the Opinion of the Court of Appeals Is Consistent with All Relevant Precedent.

The Fourth Circuit's decision does not narrow the principles of law established in *Elrod* and *Branti*, and it does not create a blanket exception for pre-election political firings. Fairly read, the court's decision appropriately interprets the scope of a public employee's First Amendment associational rights. The decision was not arbitrarily based on issues of timing, but on the facts alleged, or more

precisely – the total lack of facts presented regarding the Petitioner's First Amendment associational claim. In this regard, the Fourth Circuit's opinion is consistent with all relevant precedent, because like other federal courts, the Fourth Circuit required the Petitioner to present an objective factual connection between her dismissal and an illegal political motivation by her employer.

The general principle of law first adopted by this Court in *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976) (plurality) is well recognized and widely accepted. The First Amendment prohibits public employees from being terminated solely on the basis of their political beliefs. The only exception to this principle of law was established in *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980). *Branti* provides that public employees can be terminated for political reasons if their position is one that requires their beliefs to conform to that of their employer. 445 U.S. at 515-16 (1980).

In the years that have followed, federal courts have applied the general principles espoused in *Elrod* and *Branti* to cases involving various factual scenarios and circumstances. The Petitioner aptly reviewed a number of these cases that illustrate the breadth of a public employee's political associational rights. Indeed, the Respondent has no quarrel with the basic holdings of the cases cited by the Petitioner. However, these cases offer little to save the Petitioner's claim. Instead, the cases she cites exemplify the point made by the Fourth Circuit. There is simply no objective factual connection between Ms. Smith's dismissal and the political beliefs or affiliations of either party in this action. In each of the cases cited by the Petitioner there is at a minimum some facts or circumstances from which one could at least infer the adverse

employment action was politically motivated. There are objective facts in these cases that, if taken as true, indicated what the political beliefs or affiliations of at least one of the parties were at the time the employee was terminated. In sum, the complaints were based on more than the employee's own perception of events.

It is undisputed at this stage of the proceedings that Ms. Smith did not engage in any conduct or otherwise make her political beliefs or her political affiliation known. There are no allegations regarding Judge Frye's political beliefs either; he was detached from the subject election process and there are no allegations that he ever expressed any opinions regarding the incumbent clerk. The Petitioner's allegation that she was fired because Judge Frye believed she did not support the incumbent clerk is solely her perception of a possible reason for her discharge.

Faced with these speculative factual allegations, the Fourth Circuit reviewed other reported cases involving political firings. The point of this review was not to isolate two sets of facts and circumstances that must be present to state a claim under *Elrod*. As stated above, the court's intention was to demonstrate the objective criteria that have been present in all previously reported cases involving public employee's First Amendment associational rights. This point is well summarized in the court's opinion:

> Indeed, the very differences between the circumstances here and those in the cases within the usual *Elrod* fact patterns suggest that Judge Frye had constitutionally valid reasons for dismissing Ms. Smith. Although we of course accept as true at this stage of the litigation Ms. Smith's allegation that she was fired because Judge Frye

> believed that she supported her son's candidacy rather than that of the incumbent circuit clerk, such an allegation does not necessarily, by itself, state a First Amendment claim under *Elrod*. Rather, Judge Frye's belief that Ms. Smith supported her son's candidacy might have lead Judge Frye to conclude that, in a small office in which Ms. Smith was working with the incumbent circuit clerk, the potential conflict of interest would hinder the efficient administration of the judicial system. It is undisputed that Judge Frye's colleague testified in the state administrative proceedings that Judge Frye expressed those very concerns to him. In the context of at-will employment, such a belief is more than an adequate reason to dismiss an employee. 488 F.3d at 271.

Consequently, it cannot be legitimately concluded that the Fourth Circuit has now sanctioned all pre-election political firings. To the contrary, if there had been any objective evidence that Judge Frye indeed required, or even expected, Ms. Smith to pledge her political support for the incumbent clerk the outcome of this case would have been quite different. In sum, it was the Petitioner's claim that conflicts with years of precedent interpreting *Elrod* and *Branti*, not the Fourth Circuit's opinion.

B. When a Constitutional Right Is Not Clearly Established, Government Officials Are Entitled to Qualified Immunity.

1. The Contours of the Right Alleged by the Petitioner Are Far Afield from Any Reported Case Law Regarding First Amendment Associational Rights.

The doctrine of qualified immunity was established by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct.

2727 (1982). Government officials performing discretionary tasks are properly shielded from civil liability if their actions did not violate any clearly established statutory or constitutional right of which a reasonable person would have known. 457 U.S. at 818 (1982). In subsequent cases, this Court has provided guidance for applying the *Harlow* test, recognizing that in many cases a recitation of a general or widely recognized right will simply not be enough to overcome the defense of qualified immunity.

In *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987), this Court discussed the level of specificity that is necessary for a proper determination to be made that denies a government official the benefit of qualified immunity. The right the official is alleged to have violated must be clearly established, not at its most general level, but rather the contours of the right must be sufficiently clear in order to satisfy *Harlow*'s standard of objective legal reasonableness. 483 U.S. at 639-40 (1980). The level of specificity regarding the right is especially significant in this case and similar cases that are, in reality, an attack on an at-will employment decision. State officials charged with maintaining the operation of offices that deliver vital services to the public must have discretion in employment decisions. Therefore, in maintaining the balance between public duties and private rights they are entitled to particularized findings regarding the constitutional rights of public employees. If only generally plead rights sufficed, the at-will employment rule with respect to public employment would cease to exist.

Plaintiffs should not be able to transform the doctrine of qualified immunity into a rule of pleading by alleging violations of extremely abstract rights. 483 U.S. at 639. This is true because qualified immunity operates "to

ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 1215 S. Ct. 2151 (2001). Ms. Smith has repeatedly stated in her petition to this Court that Judge Frye fired her because he believed she supported her son and not the incumbent clerk. This contention was, however, highly speculative in light of the existing facts and circumstances. The pertinent question in relation to qualified immunity is whether in 2004, Judge Frye should reasonably have known that he could not dismiss an at-will employee whose political beliefs and affiliations were unknown at a time when he was detached from the political process and had expressed no views on the incumbent circuit clerk, simply because the employee's son was running for political office.

A unanimous panel of the Fourth Circuit Court of Appeals concluded that even assuming Ms. Smith had stated a violation of her constitutional rights, Judge Frye was entitled to qualified immunity.[4] In reaching this conclusion, the court recognized that only if the law was applied at its most rudimentary level could one conclude that Judge Frye's actions were unlawful. Indeed, this case presented facts and circumstances (or rather, a lack of facts and circumstances), which have not been found to violate the principles of *Elrod* and *Branti* in any reported case law.

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[4] Judge Motz filed an opinion concurring in part and concurring in the judgment. She concluded that the Petitioner had stated a valid claim, but that her claim was so far removed from any case interpreting *Elrod* and *Branti* that Judge Frye could not have reasonably known that her dismissal violated a clearly established right. *Smith v. Frye*, 488 F.3d 263, 276-77 (4th Cir. 2007) (Motz, D., concurring).

It is certainly reasonable to assume that a government official should know that at-will employees cannot be dismissed solely because of their political beliefs. However, this general principle of law simply does not satisfy the inquiry in this case. To the contrary, it is quite clear that *Elrod* and *Branti* have never been extended to a claim as attenuated as the Petitioner's.

Therefore, to say that Judge Frye should reasonably have known that his conduct was unconstitutional is, in fact, patently unreasonable. At the time of her dismissal, Judge Frye had the authority to dismiss the Petitioner for good reason, bad reason or no reason, as long as the dismissal was not contrary to established law. The political beliefs of both he and Ms. Smith were simply unknown and the complaint is devoid of any connection between the political associations of either of these parties and the discharge. Even assuming Ms. Smith had adequately alleged an associational rights claim, in consideration of all known precedent interpreting *Elrod* and *Branti* at the time, Judge Frye is entitled to qualified immunity.

2. The Petitioner's Contention That the Fourth Circuit's Decision Will Unnecessarily Increase Litigation Is Erroneous and Misinterprets the Opinion.

The Fourth Circuit did not sanction the political firings of public employees if the termination occurs before an election. More to the point, the court did not conclude that the Petitioner's claim failed because no other cases had found pre-election firings to be unconstitutional. Rather, the court concluded, as discussed in the preceding section, that the Petitioner's claim which was based solely on what she believed Judge Frye was thinking was far

afield from any reported case law regarding the First Amendment associational rights of public employees. The facts and circumstances presented in the Petitioner's attenuated allegations plainly did not permit any logical inference that Judge Frye's decision was politically motivated. There were indeed no facts alleged regarding the political affiliations of either party.

Given the dearth of facts alleged by the Petitioner, the Fourth Circuit concluded that it was impossible to conform her claim to any of the reported case law interpreting *Elrod* and *Branti*. The Fourth Circuit did not decide that politically motivated firings can only occur after an election. Rather, the court did observe that firings that occur after an election are more likely to suggest, in conjunction with other facts, that the official actions were politically motivated. If the Petitioner's allegations involved Judge Frye requiring his employees to support the incumbent clerk, or Ms. Smith openly campaigning for her son, the outcome of this case could be quite different, regardless of whether the dismissal occurred before or after the election.

Consequently, there is no legitimate basis to support the Petitioner's dire prediction that an increase in political firing will occur because state officials believe their pre-election political firings are immune from civil liability. In fact, if the Fourth Circuit had found a constitutional violation on the basis of these meager facts, it is more reasonable to assume that every at-will employee fired close in time to an election would attempt to stake a constitutional claim based upon bare allegations about what their employer must have believed. The court acknowledged these very concerns, expressing that approving this case would require a more pervasive intrusion into

the at-will employment relationship between government officials and public employees.

C. The Fourth Circuit Had Two Equally Valid Grounds to Dismiss the Petitioner's Claims Pursuant to Rule 12(b)(6).

In general, the pleading standard under the Federal Rules of Civil Procedure is liberal. However, this does not relieve a plaintiff of the obligation of stating a viable claim. And it is well established under federal law that courts are not required to accept conclusory allegations couched as facts and nothing more when ruling on a motion to dismiss pursuant to Rule 12(b)(6). *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932 (1986). In the same vein: "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955, 1965 (2007).

In paragraph 18 of her original complaint, the Petitioner baldly alleged: "The defendant fired Ms. Smith because her son, Greg Smith, had filed to run against the incumbent Circuit Clerk in the Republican Party primary and because the defendant believed that Ms. Smith supported her son, not the incumbent circuit clerk." This allegation, while presented as a fact, was nothing more than Ms. Smith's perception of why she was fired. There were no factual allegations presented that suggested Judge Frye had an illegal political motivation when he dismissed the Petitioner. There were no facts alleged that even suggested Judge Frye wanted the Petitioner to support the incumbent clerk or even that he in fact supported the incumbent clerk himself. On its face, the

complaint simply did not state a violation of the Petitioner's First Amendment associational rights. Consequently, the Fourth Circuit's affirmance of the district court was well within applicable federal 12(b)(6) standards.

Moreover, even assuming the Petitioner sufficiently alleged a violation of her First Amendment associational rights, it is still beyond any reasonable dispute that Judge Frye is entitled to qualified immunity. As discussed above, while it is well known that a public employee cannot be fired solely on the basis of their political beliefs, this general principle of law was simply not enough to put Judge Frye on notice that he could not legally dismiss the Petitioner. *Elrod* and *Branti* have never been extended to facts as attenuated as those presented by the Petitioner. Therefore, it was within the applicable federal standard for the Fourth Circuit to conclude that Judge Frye was entitled to qualified immunity and to affirm the District Court's dismissal of the Petitioner's claims.

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

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